Extradition and the Principle aut dedere aut judicare in the New Polish Legislation

1. INTRODUCTION

Owing to the Polish legal tradition and jurisprudence, the principle aut dedere aut judicare has never been defined or formulated as such in the domestic law. Instead, certain mechanisms are provided which make this rule operate notwithstanding a treaty stipulation to that effect. Therefore, it works both when extradition is based on treaty or convention and on the Polish domestic law. More importantly, its scope of application goes beyond the traditional ground for refusal of extradition, that is, the nationality of the person requested; the competent authorities may also resort to it where surrender was denied for some other reasons, such as the political offence or asylum. In addition to the Constitution, the legal foundations of the rule are embodied in both substantive law (Criminal Code) and its procedural counterpart (Code of Criminal Procedure). The principle aut dedere aut judicare is based on the following four elements:

1. the duty to extradite,
2. the scope of grounds for mandatory and optional refusal,
3. the scope of application of Polish criminal law in the space (what is commonly called jurisdiction), and
4. the rule (system) of mandatory prosecution (Legalitätsprinzip).

In 1997, major legislative changes took place in Poland: The entirely new Constitution came into force on 17 October and the new Criminal Code and the Code of Criminal Procedure

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3. Due to the present status of the principle aut dedere aut judicare in international law, it may be argued that the principle becomes meaningful and binding only after it has been adopted in an international instrument. Cf. I. Shearer, Extradition in International Law (1971) pp. 219-233.
were adopted by the Parliament on 1 January 1998. In order to give a complete description of the principle *aut dedere aut judicare* and to fully evaluate the way it has been implemented in the Polish legal system, the following sources have to be consulted and taken into account: the Constitution, the Criminal Code and the Code of Criminal Procedure. Arguably, the effectiveness and efficiency of the mechanism based on this principle is dependent not so much on the language used in a treaty to stipulate *judicare* but rather on the existence of specific procedures and legal tools in the requested state’s domestic legislation that can be relied upon, and used to facilitate fulfilling by this state, of its alternative obligation.

2. CONSTITUTION OF THE REPUBLIC OF POLAND

On 2 April 1997, the Polish National Assembly adopted an entirely new Constitution which shows almost no resemblance to the previous Constitution of 1952. The pertinent pronouncement reads as follows:

Article 55
1. Extradition of a Polish national is prohibited.
2. Extradition of a person suspected of having committed an offence out of political reasons and without the use of violence is prohibited.
3. A court decides on the admissibility of extradition.

These three provisions have no precedent in the long history of Poland, that is, since 966 A.D. None of the several Polish constitutions have ever addressed the problems of extradition, not to mention the ban on the surrendering of Polish nationals. It is not to say that the extradition of Polish nationals was allowed in the past. This was not the case. But the relevant norm was embodied either in the criminal code or the code of criminal procedure. This tradition began with the laws which were in force in the territory of Poland after the First World War until 1928 (criminal procedure) and 1932 (substantive criminal law). Both the Austrian Criminal Code of 1852 (§36) and the German Criminal Code of 1871 (§9) expressly and categorically prohibited extradition of nationals. Similarly, the Russian Criminal Code of 1903 (Art. 13) allowed only the surrender of ‘foreigners’. The Polish Criminal Code of 1932 did not address this problem; its drafters considered extradition as a matter which belongs to the criminal procedure, and not the substantive law. The problem was, however, that the Code of Criminal Procedure adopted in 1928 contained no provisions on the grounds for refusal, and consequently, was also silent on the question of the extraditability of Polish nationals.

Therefore, between 1932 and 1969, there was no legislative enactment in the domestic legal system that would make nationality a bar to extradition. Nonetheless, the non-extradition of Polish nationals was always considered as an ‘axiom’ by legal writers and commentators. This attitude was reflected in the treaty practice. Out of many bilateral extradition treaties signed and ratified by Poland between 1932 and 1969 not even one departed from the...